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No. 84-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

COPY-DATA SYSTEMS, INC. and
SYNERGISTICS, INC.,

Petitioners,

v.

TOSHIBA AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent Toshiba America, Inc. ("TAI") submits this Brief to summarize for the Court the reasons why a writ of certiorari should not be granted to petitioners Copy-Data Systems, Inc. and Synergistics, Inc. (referred to herein collectively as "Copy-Data") in this case.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Petitioners' argument and statement of this case are literally contrived out of thin air to create the appearance of an unsettled procedural issue. In attempting to obtain certiorari, petitioners misstate both the legal standard used by the Court of Appeals for the Second Circuit and the actual bases for the decision.

1. The Court of Appeals Applied the Classic Test in Determining Whether a Finding is "Clearly Erroneous"

In this case, the Court of Appeals for the Second Circuit did nothing more than apply the long-established and deeply entrenched Rule 52(a) "clearly erroneous" test, as articulated in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The court simply found that, upon painstaking review of the entire record, "[it] was left with the 'definite and firm' conviction that the district court was clearly erroneous with regard to certain key facts" (App. A to Petition for Certiorari, at 2066).

The Second Circuit did not state that it was entitled to "ignore" the district court findings in view of the documentary evidence, or that it had free license to overlook witness testimony, nor did it do so. The issue framed by petitioners — *de novo review* based solely on consideration of documents — is simply not this case. The Court of Appeals did not even cite or refer to *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft, Corp.*, 751 F.2d 117 (2d Cir. 1984), upon which petitioners pin their arguments.

Since this is an instance of traditional Rule 52(a) application, there are patently no controversies or variances among the courts of appeals to be considered. Petitioners' application certainly presents no substantial or important question of federal law for this Court to decide.

2. *The Court of Appeals Held, Alternatively, That as a Matter of State Law, Petitioners Could Not Prevail Even on the Facts as Found by the District Court*

Nearly every facet of petitioners' presentation to this Court misrepresents the Second Circuit's decision itself. In each instance cited by petitioners as an issue of the Court of Appeals' overturning the lower court's facts and ignoring the oral testimony of petitioners' witnesses, the court actually credited the oral testimony and/or assumed petitioner's factual assertions to be true, but reached a different legal conclusion than the lower court had reached on those facts.

These misrepresentations can be briefly highlighted:

1) Copy-Data claims in its petition that, as a factual matter and a matter of the "credibility of witnesses", the Second Circuit found that Copy-Data voluntarily withdrew from the Chicago and Mid-Atlantic marketing regions, while the district court found it was "coerced to withdraw". (Petition for Certiorari, at 22). In actuality, the two courts differed only as to the legal conclusion to be reached on the facts. The Second Circuit *accepted as true* the facts upon which the district court found liability, but found on those facts, there was no legal liability. (*See* App. A to Petition for Certiorari, at 2072. ("We may accept as true Copy-Data's assertion that it did so [withdraw] not out of a desire to give up these sales but solely to appease Toshiba so as to maintain a working relationship")).

2) The same misleading presentation is made by Copy-Data with respect to the issue of whether TAI refused to accept copiers from Copy-Data for return. (This finding was described by Copy-Data as the "cornerstone" of its claim. (*See* App. A to the Petition for Certiorari, at 2071.))

Copy-Data states that the court simply "declared that Copy-Data's witnesses were not credible." (Petition for Certiorari, at 22.) The court's reasoning is clearly set out in the decision, and although it noted the complete lack of contemporaneous evidentiary support for the district court's factual finding that TAI refused to accept returns, it then went on to state that, under New York law, "even assuming the (oral testimony) to be true, there is nothing wrongful in Toshiba's refusal to respond to oral requests of such generality." (App. A to Petition for Certiorari, at 2071.)

3) The third instance in which Copy-Data claims the Court of Appeals set aside a factual finding related to the question of why Copy-Data was withholding disastrous financial information from TAI. (Petition for Certiorari, at 22-23.) The Second Circuit did set forth that the contemporaneous documents directly conflicted with Copy-Data's story at trial. But, it found, whether or not the financial statement had already been prepared, under New York debtor-creditor law, Copy-Data's mere failure to provide a financial statement to TAI "had a legal significance upon which Toshiba was entitled to act". (App. A to the Petition for Certiorari at 2070.) Therefore, TAI incurred no *legal* liability by cutting petitioners' credit line, due to the absence of a financial statement.

In short, the Court of Appeals did not decide this case in the manner described by petitioners. The court gave more than adequate consideration to the oral testimony given, and determined that the issues pinpointed by the petitioners as questions of fact, were really questions of law, or at best, mixed questions of fact and law. Analyzing state law, it then held that petitioners could not prevail even on the facts as found by the district court.

CONCLUSION

For all of the foregoing reasons which demonstrate that there are no special and important reasons for granting review in this case, the petition for writ of certiorari should be denied.

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